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GA ESCROW, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 GA ESCROW, LLC, a Delaware limited
12 liability company, a Representative for the
Escrow Participants,

Plaintiff,

V.

15 AUTONOMY CORPORATION PLC, a
16 corporation formed under the laws of
England and Wales.

Defendants.

Case No. C-08-1784 SI

**OPPOSITION TO DEFENDANT
AUTONOMY CORPORATION PLC'S
NOTICE OF MOTION AND MOTION TO
DISMISS PURSUANT TO RULE 12(B)(6)
OF THE FEDERAL RULES OF CIVIL
PROCEDURE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: July 11, 2008

Time: 9:00 AM

Judge: The Hon. Susan Ilston

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1 Plaintiff GA Escrow, LLC (“GA Escrow”) respectfully submits this memorandum in
 2 opposition to the Motion to Dismiss (“Motion”) filed by Defendant Autonomy Corporation PLC
 3 (“Autonomy”), pursuant to Federal Rule of Civil Procedure 12(b)(6).

4 **I. INTRODUCTION**

5 This is a case about a notice (the “Notice of Claim”) submitted by a purchaser of a
 6 business to obtain the release of funds held in escrow, which notice now appears to have been
 7 submitted without any legitimate basis. As shareholder representative, GA Escrow seeks only to
 8 protect the selling shareholders from an unjustified and unsubstantiated withholding of funds
 9 owed to them under the terms of the parties’ Merger Agreement. On this Motion to Dismiss (the
 10 “Motion”), however, Autonomy seeks to keep the escrowed funds it obtained by means of its
 11 fraudulent notice, without any discovery at all into GA Escrow’s claims. Autonomy’s motion
 12 should be denied.

13 Autonomy’s Notice of Claim was inadequate to establish a “specified” loss and now
 14 appears to have been fraudulent. Nowhere in the transaction documents is it contemplated that
 15 payment will be made for “approximate” amounts, and nowhere is it contemplated that
 16 Autonomy will be paid for losses it has not legitimately incurred. GA Escrow seeks, and has
 17 always sought, a fair determination of a sum certain that is subject to indemnification for a loss
 18 actually suffered. Autonomy’s nine month refusal to provide any support whatsoever to
 19 substantiate its indemnification claim for losses of “approximately” \$8 million is compelling
 20 evidence that it never had any basis on which to make its original claim, and committed a fraud.
 21 Accordingly, GA Escrow should be permitted to proceed on its claims against Autonomy.

22 Autonomy seeks to hide behind a 10-day objection period in an attempt to shield itself
 23 from the consequences of its fraudulent actions and to retain payments obtained under false
 24 pretenses. California law, however, does not permit such maneuvering, and, for the reasons set
 25 out more fully below, Autonomy’s attempts to discredit GA Escrow’s valid and properly pleaded
 26 claims should be rejected, and Autonomy’s Motion should be denied.

27 **II. STATEMENT OF ISSUES TO BE DECIDED**

28 1. Whether GA Escrow’s claims against Autonomy for breach of contract, breach of

1 the implied covenant of good faith and fair dealing, negligent misrepresentation, unjust
 2 enrichment and accounting, meet the applicable pleading standards under Federal Rule of Civil
 3 Procedure 12(b)(6).

4 2. Whether GA Escrow's claim against Autonomy for fraud meets the applicable
 5 pleading standards under Federal Rules of Civil Procedure 9(b) and 12(b)(6).

6 **III. FACTUAL BACKGROUND**

7 Zantaz, Inc. ("Zantaz") provides electronic data archiving software solutions and services
 8 to companies throughout the world. Complaint ¶ 8. On or about July 3, 2007, Autonomy
 9 acquired all of the outstanding shares of Zantaz capital stock for approximately \$400 million (the
 10 "Merger Transaction"). *Id.* ¶ 9. GA Escrow was and is the appointed Escrow Participants'
 11 Representative for Zantaz's former shareholders (together, the "Escrow Participants") in
 12 connection with Autonomy's acquisition of Zantaz. *Id.* ¶ 2. As part of the Merger Transaction,
 13 the parties entered into several agreements, including the Merger Agreement and the Escrow
 14 Agreement (together, the "Agreements"). *Id.* ¶¶ 9, 15.

15 Pursuant to Section 2.6(c)(i) of the Merger Agreement, an amount equal to \$20,500,000
 16 was withheld from the Merger Consideration and placed into escrow (the "Indemnity Escrow
 17 Fund"). Complaint ¶ 10. These funds were to be available to satisfy indemnification claims for
 18 losses to which Autonomy might be entitled pursuant to Article VIII of the Merger Agreement.
 19 *Id.* The remaining funds were to be paid to the Escrow Participants. *Id.*

20 The Merger Agreement requires that all claims for "Losses," as defined in the Agreement,
 21 be made by written notice delivered by Autonomy to GA Escrow and the Escrow Agent promptly
 22 after discovery of a matter giving rise to such a claim. Complaint ¶ 12. Similarly, the Escrow
 23 Agreement requires Autonomy to make a written request to both the Escrow Participants'
 24 Representative and the Escrow Agent for the payment of any claim for indemnification for Losses
 25 as defined in Article VIII of the Merger Agreement (a "Payment Request"). *Id.* ¶ 17.
 26 Specifically, the Escrow Agreement requires that such a Payment Request "set forth the amount
 27 requested, and in reasonable detail the specific basis for the determination of the amount of the
 28 claim and as to why Parent Indemnitee [Autonomy] is entitled to the payment of such

1 amount. . ." *Id.* (emphasis added). Section 3(b)(iv) of the Escrow Agreement authorizes the
 2 Escrow Agent to pay "an amount equal to the amount requested" in the Payment Request.
 3 Declaration of Andrew Kanter ("Kanter Decl."), Exhibit B at 3.¹

4 On September 11, 2007, Autonomy sent to GA Escrow and the Escrow Agent its Notice
 5 of Claim, purporting to assert certain claims under Section 8.2(a) of the Merger Agreement for
 6 Losses of "approximately" \$8 million. Complaint ¶ 18. As detailed in the Complaint,
 7 Autonomy's Notice of Claim was deficient for several reasons. In particular, it was not made for
 8 a specified sum certain, but rather for an "approximate" loss amount. *Id.* Nothing in the
 9 Agreements contemplates claims or payments for "approximate" amounts.² Nor did Autonomy
 10 provide specific detail to support the four claims of "approximately \$2,000,000" listed in the
 11 Notice of Claim. Complaint ¶ 24.

12 In fact, following its receipt of the Notice of Claim, GA Escrow repeatedly asked for the
 13 basis for the purported "approximate" claims, yet received no such details, suggesting Autonomy
 14 never had any legitimate basis for these claims. *Id.* Even though GA Escrow informed
 15 Autonomy in writing that it believed Autonomy had committed a fraud, Autonomy has to date
 16 refused to provide any information or documentation supporting its Notice of Claim or explaining
 17 why its actions do not constitute a fraud. *Id.*

18 **IV. LEGAL STANDARD**

19 In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court is to construe the
 20 complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and
 21 draw all reasonable inferences in the light most favorable to the plaintiff. *Westland Water Dist. v.*
 22 *Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898
 23 (9th Cir. 1986); 5A *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure*

24 ¹ The Escrow Agreement is Exhibit B to the Declaration of Andrew Kanter in Support of
 25 Defendant Autonomy Corporation PLC's Motion to Dismiss, filed on April 9, 2008. The Merger
 26 Agreement and Autonomy's September 11, 2007 Notice of Claim referenced herein are also
 27 attached to the Kanter Declaration as Exhibits A and C, respectively.

28 ² Autonomy's Motion never quotes the exact language of its Notice of Claim, *i.e.*, the
 29 "approximately" language. Instead, it incorrectly asserts that the claim was for a sum certain of
 30 \$8 million which is not what its Notice of Claim stated. *See, e.g.*, Motion at 5.

1 § 1337 (2d ed. 1990); *see also Adam v. Silicon Valley Bancshares*, 884 F. Supp. 1398, 1400 (N.D.
 2 Cal. 1995) (in ruling on a motion to dismiss, district courts accept all material allegations of fact
 3 alleged in the complaint as true, and resolve all doubts in favor of plaintiff). The Federal Rules of
 4 Civil Procedure require only a “short and plain statement of the claim showing that the pleader is
 5 entitled to relief.” Fed. Rules Civ. Proc. 8(a). The Rule 8 standard contains “a powerful
 6 presumption against rejecting pleadings for failure to state a claim.” *Gilligan v. Jamco Dev.*
 7 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citing *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381,
 8 386 (5th Cir. 1985)); *see also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986)
 9 (“It is axiomatic that ‘the motion to dismiss for failure to state a claim is viewed with disfavor and
 10 is rarely granted.’”).³

11 V. LEGAL ARGUMENT

12 Autonomy’s assertion that the Merger and Escrow Agreements bar each of GA Escrow’s
 13 causes of action is unsupported by California law, which applies here. Under Autonomy’s
 14 reading of the law, Autonomy is immune from any consequences for its Notice of Claim, that
 15 apparently sought the recovery of funds for losses that did not occur, as long as 10 days passes
 16 without objection after it submits its notice. Such an interpretation does not withstand scrutiny.

17 According to Autonomy, it is entitled to keep money as to which it has no properly
 18 supported claim. Autonomy argues that because GA Escrow had “*the absolute and unfettered*
 19 *right to stop the payment to Autonomy simply by objecting Autonomy’s request for payment*
 20 *within a specified timeframe,*” it has no remedy for Autonomy’s wrongful acts, including fraud.
 21 Motion at 2 (emphasis in original). Autonomy further argues that “any objection by GA Escrow,
 22 *even a frivolous one*, automatically prevents disbursement of the requested amount.” Motion at 9
 23 (emphasis added). The argument fails for at least three reasons. First, there is always a duty to
 24 comply properly and in good faith with the notice requirements of an agreement; second, the
 25 Agreements do not contemplate parties being paid for losses that were not sustained, and third it

26 ³ Even if dismissal is warranted, leave to amend must be granted unless it is clear that the
 27 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dept. of Corr.*, 66 F.3d 245,
 28 248 (9th Cir. 1995).

1 cannot be that the mere passage of the 10-day period somehow immunized a fraud. Indeed, under
 2 Autonomy's view, parties should always object and block escrow payments whenever requests
 3 for such payments are made—regardless of whether they suspect wrongdoing. Such an argument
 4 would render all escrow arrangements unworkable by compelling all participants to act in bad
 5 faith and object to all indemnity claims to protect against unknown breaches and frauds.

6 **A. GA Escrow Has Successfully Stated A Cause Of Action For Fraud.⁴**

7 Autonomy's argument to dismiss GA Escrow's fraud claim is notably short and
 8 conclusory.⁵ Autonomy argues that GA Escrow's allegation that on September 11, 2007
 9 Autonomy submitted claims for "approximate" amounts of Losses to the Escrow Agent without
 10 any factual basis to support such Losses "should be disregarded" because, as of September 25,
 11 2007, the approximate Losses listed by Autonomy were conclusively deemed Losses subject to
 12 indemnification according to the Merger Agreement. Under Autonomy's interpretation of the
 13 Agreements, GA Escrow is barred from bringing a fraud action if it does not object within 10
 14 days of Autonomy's notice of claim—regardless of whether Autonomy submitted the claim
 15 knowing it was baseless, and regardless of whether GA Escrow could know it was fraudulent.
 16 According to Autonomy, GA Escrow's only remedy was to object to the Payment Request, even
 17 if the objection was "a frivolous one" at the time. Motion at 9. Such an interpretation is contrary
 18 to California law and should be rejected.

19

20

21

⁴ "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court*, 12 Cal. App. 4th 631, 638 (1996). GA Escrow has properly alleged a claim for fraud: (a) Autonomy provided a false notice of claim with (b) knowledge that it was false and (c) the intent to induce reliance from both the Escrow Agent and GA Escrow; on which (d) both the Escrow Agent and GA Escrow justifiably relied; resulting in (e) damages in the amount of up to \$8 million paid out to Autonomy. Complaint ¶¶ 25-27.

⁵ Autonomy addresses GA Escrow's negligent misrepresentation and fraud claims together and makes no independent arguments against the sufficiency of GA Escrow's negligent misrepresentation claim. For the same reasons that Autonomy's arguments against GA Escrow's fraud claim fails, Autonomy's arguments against the negligent misrepresentation claim also fails.

1 **1. The Merger Agreement does not shorten California's three-year
2 statute of limitations on an action for fraud or impose a 10-day
3 discovery period.**

4 Autonomy's assertion that Section 8.6 of the Merger Agreement bars GA Escrow's fraud
5 claim is baseless. In order for the Merger Agreement to bar GA Escrow's fraud claim,
6 Section 8.6 would have to be interpreted as either: (1) a contractual shortening of the three-year
7 statute of limitations for a fraud claim; or (2) a contractual time limit on the accrual of a fraud
8 cause of action. Both interpretations are contrary to California law concerning filing time limits
9 and claim accrual. The Merger Agreement does not waive claims for fraud.

10 First, California law provides a three-year statute of limitations for fraud actions. Cal.
11 Code Civ. Proc. § 338(d). There is no provision in the Merger Agreement or Escrow Agreement
12 that expressly or impliedly shortens this three-year statute of limitations. Autonomy does not,
13 and cannot, assert otherwise. Section 8.6 provides that "the Losses specified in such Notice of
14 Claim will be conclusively deemed Losses subject to indemnification" if no timely objection is
15 made, but it does not expressly limit GA Escrow's right to file a lawsuit disputing the Notice of
16 Claim if it fails to object within 10 days due to the fraudulent behavior of Autonomy.

17 Second, Autonomy's fraudulent submission of a Notice of Claim warrants application of
18 the discovery rule to GA Escrow's fraud claim. California law applies the discovery rule to fraud
19 causes of action. Cal. Code Civ. Proc. § 338(d). The discovery rule is an exception to the general
20 rule that a cause of action accrues at the time when the cause of action is complete. *E-Fab, Inc. v.*
21 *Accountants, Inc. Servs.*, 153 Cal.App.4th 1308, 1317-18 (2007) (finding accrual trigger was
22 plaintiff's discovery of defendant's misrepresentations of employee's qualifications). The rule
23 permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at
24 issue. *Weatherly v. Universal Music Publ'g Group*, 125 Cal. App. 4th 913, 918-19 (2004).
25 Under the rule, a plaintiff, prevented from discovery, should not suffer and a defendant should not
26 "knowingly profit" from the plaintiff's ignorance. *Id.* at 919. Here, GA Escrow was not aware of
27 Autonomy's fraudulent behavior until Autonomy refused to provide any support whatsoever for
28 its claims for "approximate" Losses.

Autonomy also improperly attempts to convert the 10-day contractual objection period of

1 the Agreements into a 10-day discovery period for any fraud or negligent misrepresentation
 2 claims. Such attempts fail, however, because under California law the discovery rule also applies
 3 in the context of contractual limitations provisions. *Weatherly*, 125 Cal. App. 4th at 919 (citing
 4 *Moreno v. Sanchez*, 106 Cal.App.4th 1415, 1423 (2003)). Parties may not contract around the
 5 discovery rule in situations where it would otherwise apply, such as fraud. *See Moreno*, 106 Cal.
 6 App. 4th at 1433. In *Weatherly*, plaintiff songwriter (“Writer”) entered into an Exclusive
 7 Songwriter’s and Composer’s Agreement with a publisher. The Agreement provided that:

8 All royalty statements and other accounts rendered by Publisher
 9 shall be binding upon Writer and not subject to any objection for
 10 any reason, unless such objection is specific and is made in writing,
 11 stating the basis thereof, and delivered to Publisher within one (1)
 12 year from the date of such statement or account, and Writer shall be
 13 barred from maintaining or instituting any suit based on such
 14 objection unless such suit is commenced within one (1) year after
 15 the date on which Publisher notifies Writer that it denies the
 16 validity of the objection.

17 *Id.* at 915-16. Even though the plaintiff waited approximately 25 years to invoke his right to audit
 18 the Publisher’s books, the *Weatherly* court rejected the lower court’s finding that the delayed
 19 discovery rule did not apply. *Id.* at 917. Further, the court rejected the lower court’s finding that
 20 the one year contractual limitations period barred all causes of action arising from defendant’s
 21 alleged failure to pay royalties including fraud, breaches of contract and breach of the implied
 22 covenant of good faith and fair dealing. *Id.* at 919-20. Here, GA Escrow advised Autonomy in
 23 writing that it appeared a fraud had been committed on both GA Escrow and its agent as soon as
 24 it became apparent that Autonomy would not, and presumably could not, provide support for its
 25 claimed losses, *see* Complaint ¶ 24, and brought its action well within the statutory period. As
 26 such, the discovery rule properly applies to GA Escrow’s fraud claim, and GA Escrow is not
 27 barred by Section 8.6 of the Merger Agreement from bringing such a claim.

28 **2. GA Escrow has properly pleaded damages resulting from Autonomy’s
 29 fraudulent conduct.**

30 To support its assertion that GA Escrow cannot allege any facts that will support a finding
 31 of fraud damages, Autonomy repeats its mantra: if GA Escrow wanted to avoid being damaged
 32 by Autonomy’s fraud, it had to object within 10 days regardless of whether it knew of

1 wrongdoing. Autonomy argues that, even assuming Autonomy lacked a factual basis for its loss
 2 claims when it submitted the Payment Request, it was GA Escrow's failure to object within
 3 10 days, rather than Autonomy's fraudulent Payment Request, that caused GA Escrow's
 4 damages. Motion at 11. This means that Autonomy may keep the money and be unjustly
 5 enriched. That is not the law.

6 The only support Autonomy provides for its position is *Goehring v. Chapman Univ.*, 121
 7 Cal. App.4th 353, 365 (2004)), which does not apply to the facts here. *Goehring*, a decision
 8 affirming an order granting summary judgment, stands for the proposition that “[a]ssuming a
 9 claimant's reliance on the actionable misrepresentation, no liability attaches if the damages
 10 sustained were otherwise inevitable or due to *unrelated causes*.¹¹ *Id.* at 365 (emphasis in
 11 decision). In *Goehring*, the Court found that plaintiff student's alleged damages—which were
 12 based on his not graduating from an accredited law school—were not due to misrepresentations
 13 by the school that it would be accredited by the time of plaintiff's graduation, but were due
 14 instead to plaintiff's being dismissed from the school for academic reasons prior to his earning a
 15 degree. *Id.* at 364-365. The facts in this case are nothing like those of *Goehring*.

16 GA Escrow's damages are not, as *Goehring* requires, “otherwise inevitable or due to
 17 *unrelated causes*.¹² Rather, as GA Escrow has properly pleaded, they were caused by the fact that
 18 Autonomy knowingly or negligently provided a fraudulent Payment Request to both GA Escrow
 19 and the Escrow Agent. Assuming that Autonomy had no factual basis for the “approximate”
 20 Losses it claimed in its Payment Request (See Complaint ¶¶ 25, 32, 36, 40, 46), it was
 21 GA Escrow's and the Escrow Agent's reliance upon the fraudulent Payment Request that caused
 22 the damage, not the fact that GA Escrow only determined the Payment Request was a fraud after
 23 the 10-day objection period expired. Autonomy's Payment Request, for “approximate” Losses,
 24 without more, did not put GA Escrow on notice that Autonomy had submitted a fraudulent claim
 25 with no factual basis at all. GA Escrow was on notice that a fraud had occurred only after
 26 Autonomy refused GA Escrow's requests for substantiation. As such, GA Escrow has pleaded
 27 facts sufficient to support a finding that Autonomy's fraud caused it to suffer damages.
 28

1 **3. GA Escrow has satisfied the pleading requirements of Rule 9(b).**

2 GA Escrow has alleged fraud with the requisite specificity to satisfy Federal Rule of Civil
 3 Procedure 9(b). Rule 9(b) “requires a plaintiff alleging fraud to state with particularity ‘the
 4 circumstances constituting fraud.’” However, it “does not require nor make legitimate the
 5 pleading of detailed evidentiary matter.” *See, e.g., Walling v. Beverly Enters.*, 476 F.2d 393, 397
 6 (9th Cir. 1973) (finding that “[t]he circumstances constituting the alleged fraud have been pled
 7 with sufficient definiteness to advise [defendant] of the claim it must meet.”). In addition,
 8 Rule 9(b) must be read in harmony with the Rule 8 requirement of “a short and plain statement of
 9 the claim showing that the pleader is entitled to relief.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d
 10 1541, 1555-56 (9th Cir. 1994) (*en banc*).

11 Autonomy’s assertion that GA Escrow has failed to plead the “when,” “how,” and “why”
 12 concerning Autonomy’s fraudulent conduct is disingenuous. The Complaint sets out, in specific
 13 detail, the circumstances constituting fraud in a concise manner. On September 11, 2007,
 14 Autonomy sent a letter to GA Escrow and the Escrow Agent purporting to assert certain claims
 15 under Section 8.2(a) of the Merger Agreement for Losses of “approximately” \$8 million.
 16 Complaint ¶ 18. The Notice of Claim was misleading and/or false because there was no factual
 17 basis to claim the “approximate” Loss amounts at the time. *Id.* ¶¶ 19-22, 25-26. GA Escrow has
 18 repeatedly attempted to determine the exact amount of Autonomy’s “approximate” claim and has
 19 advised Autonomy in writing that a fraud appears to have been committed. *Id.* ¶ 24. Autonomy
 20 cannot in good faith deny that it is on notice regarding factual particulars of the fraud claim it
 21 must defend. Based on Autonomy’s repeated refusal to provide any documentation to support its
 22 “approximate” losses, the obvious inference is that no loss ever existed, or that, at a minimum, the
 23 loss does not come close to equaling \$8 million.

24 **B. GA Escrow Has Successfully Stated A Cause Of Action For Breach Of The**
 25 **Implied Covenant Of Good Faith And Fair Dealing.**

26 Contrary to Autonomy’s assertion, GA Escrow’s claim for breach of the implied covenant
 27 of good faith and fair dealing is consistent with the Agreements. Autonomy’s assertion that the
 28 implied covenant does nothing to augment contractual covenants directly contradicts well-settled

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1 California contract law. The California Supreme Court has made clear that “the covenant is
 2 implied as a *supplement* to the express contractual covenants, to prevent a contracting party from
 3 engaging in conduct that frustrates the other party’s rights to the benefits of the agreement.”
 4 *Notrica v. State Comp. Ins. Fund*, 70 Cal. App. 4th 911, 921 (1999) (emphasis added). Here, the
 5 implied covenant should be read to supplement the indemnification and notice provisions of the
 6 Agreements by, among other things, requiring that parties only make claims for actual losses
 7 rather than fictitious losses. Allowing Autonomy to make claims for losses with no factual basis
 8 clearly would deprive GA Escrow and the Escrow Participants of the benefits of the monies owed
 9 to them from the Indemnity Escrow Fund.

10 Notably, when purporting to state the purpose of the implied covenant, Autonomy fails to
 11 cite key language from *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 349-50 (2000). Motion at
 12 10-11. The *Guz* Court recognized that the purpose of the implied covenant is to “**prevent one**
 13 **contracting party from unfairly frustrating the other** party’s right to receive *the benefits of the*
 14 *agreement actually made.*” *Guz*, 24 Cal.4th at 349 (bold text omitted from Motion at 10; italics in
 15 original decision). In fact, the *Guz* court expressly stated that “the covenant prevents a party from
 16 acting in bad faith to frustrate the contract’s actual benefits,” noting that the covenant might be
 17 violated if defendant’s action was a “mere pretext” to cheat plaintiff out of another contract
 18 benefit to which she was clearly entitled. *Id.* at 353 n.18. That is exactly what Autonomy did
 19 here. As GA Escrow alleges, by “put[ting] forth claims for approximate amounts of Losses
 20 without having any reasonable factual basis to support such Losses,” Complaint ¶ 25, Autonomy
 21 obtained a windfall of \$8 million, frustrating GA Escrow’s right to the benefit of monies from the
 22 Indemnity Escrow Fund to which it was clearly entitled under terms of the Merger Agreement.
 23 Autonomy cannot escape liability for precisely the type of actionable conduct described in *Guz*.⁶

24 ⁶ The *Guz* court rejected plaintiff’s assertion that the implied covenant of good faith and fair
 25 dealing precluded his employer from denying him the employment contract’s benefits. 24 Cal.4th
 26 at 349. The facts of *Guz*, however, are easily distinguished. As a preliminary matter, *Guz*
 27 involved review of an order granting summary judgment and not a motion to dismiss.
 28 Additionally, in *Guz*, the statutory presumption of at-will employment, which in the absence of an
 agreement to the contrary entitles an employer to terminate an employee without cause, strongly
 influenced the *Guz* Court’s dismissal of plaintiff’s implied covenant claim. *Id.* at 350-54. No
 such statutory presumption applies here.

1 **C. GA Escrow Has Successfully Stated A Cause Of Action For Breach Of**
 2 **Contract.**

3 Autonomy's assertion that GA Escrow's claim for breach of contract is entirely
 4 inconsistent with the transaction documents is also incorrect. GA Escrow can and does properly
 5 allege a claim for breach of contract.

6 **1. Autonomy's inadequate Notice of Claim was a breach of the**
 7 **Agreements.**

8 Autonomy's Notice of Claim does not comply with the Agreements, and therefore
 9 constitutes a breach of those Agreements. As noted above, Section 3(b)(ii) of the Escrow
 10 Agreement requires that a Payment Request "set forth the amount requested and, in reasonable
 11 detail, the specific basis for the determination of the amount of the Claim and as to why such
 12 Parent Indemnitee [Autonomy] is entitled to the payment of such amount . . ." Kanter Decl.,
 13 Ex. B at 2-3 (emphasis added). Similarly, the Merger Agreement states that a Notice of Claim
 14 shall set forth "the amount of such Losses."⁷ Kanter Decl. Ex. A at 64 (emphasis added). Neither
 15 agreement contemplates an indemnification payment for "approximate" amounts of Losses, or for
 16 no Losses at all. Section 3(b)(iv) of the Escrow Agreement authorizes the Escrow Agent to pay
 17 only "an amount equal to the amount requested" in the Payment Request. Kanter Decl. Ex. B at 3
 18 (emphasis added). Even Section 8.6 of the Merger Agreement, on which Autonomy relies
 19 entirely, states that only "Losses specified in such Notice of Claim" will be deemed Losses
 20 subject to indemnification. Kanter Decl. Ex. A at 67 (emphasis added). As GA Escrow has
 21 alleged, Autonomy's September 11, 2007 notice did not specify an amount of Losses, but instead
 22 only identified "approximate" amounts. Complaint ¶ 18. As such, it did not satisfy the

23 ⁷ The Merger Agreement also provides that in the case where Losses are "not known" the Notice
 24 of Claim may provide "a reasonable estimate of the foreseeable maximum amount of such
 25 losses." However, the definition of "Notice of Claim" in the Merger Agreement is included in
 26 Section 8.4 covering Third Party Claims. The "reasonable estimate" language pertains to claims
 27 made by third parties for which no final determination has been made—*i.e.*, a judgment or
 28 settlement is outstanding—as opposed to claims made by Autonomy regarding company
 financials where Autonomy is in possession of all information necessary to determine a specific
 Loss. Even in cases of third party claims, the estimate is not conclusive of the final amount of
 such Losses. Rather a determination of actual Losses must be made.

1 requirements of the Agreements to specify an “amount requested” and constitutes a breach of the
 2 terms of those Agreements. In light of that fact, whether or not there was a response during the
 3 10-day objection period, Autonomy is not entitled to retain a payment for Losses it did not suffer.
 4 The fact that the Escrow Agent did make a payment to Autonomy for an “approximate” amount
 5 of Losses does not change the fact that Autonomy did not comply with the terms of the
 6 Agreements.

7 **2. GA Escrow’s breach of contract claim is also protected by the delayed**
 8 **discovery rule.**

9 Regardless of the 10-day objection period in Section 8.6 of the Merger Agreement,
 10 Autonomy’s submission of a fraudulent Notice of Claim warrants application of the delayed
 11 discovery rule to GA Escrow’s breach of contract claim. When fraud or negligent
 12 misrepresentation is involved, the delayed discovery rule applies to a breach of contract action.
 13 *See, e.g., Watts v. Crocker-Citizens Nat’l Bank*, 132 Cal. App. 3d 516, 523 (1982); *Balfour,*
 14 *Guthrie & Co. v. Hansen*, 227 Cal. App. 2d 173, 189-91 (1964). Despite its deficiencies, there
 15 was nothing in Autonomy’s Notice of Claim that would inform GA Escrow that Autonomy had
 16 incurred no Loss or that any Losses it had incurred were massively overstated. After receiving
 17 notice of the “approximate” amounts, GA Escrow did seek to get an exact number from
 18 Autonomy. It was only after Autonomy refused to provide any support for its “approximate”
 19 amounts that GA Escrow was put on notice of Autonomy’s fraudulent behavior and breach of
 20 contract.

21 As noted above, the court in *Weatherly* found that the delayed discovery rule applied to
 22 plaintiff’s royalty agreement with his publisher despite the agreement’s one year contractual
 23 limitations provision. *Weatherly*, 125 Cal. App. 4th at 917. Further, the *Weatherly* court rejected
 24 the lower court’s finding that such a contractual limitations period barred all causes of action
 25 arising from defendant’s alleged failure to pay royalties including those for breach of contract and
 26 breach of the implied covenant of good faith and fair dealing. *Id.* at 919-20. Similarly,
 27 Section 8.6 of the Merger Agreement cannot be read to impose a 10-day limit on the discovery of
 28

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1 a breach of contract, much less a 10-day limit on a cause of action for breach of contract.⁸

2 Section 8.6 provides that “the Losses specified in such Notice of Claim will be
 3 conclusively deemed Losses subject to indemnification” if no timely objection is made, but does
 4 not expressly revoke GA Escrow’s right to file a lawsuit disputing the Notice of Claim if it fails
 5 to object within 10-days due to the fraudulent behavior of Autonomy. Kanter Decl. Ex. A at 67.
 6 There is no provision in the Agreements which would permit Autonomy to be paid for
 7 approximations instead of “specified” Losses. Instead of providing “specified” Losses,
 8 Autonomy either fraudulently or negligently asserted claims for Losses of “approximately
 9 \$8,000,000.” Stated simply, there is nothing in the Agreements that provides for Autonomy to be
 10 paid for losses it has not incurred Autonomy never quantified its approximate Losses, and
 11 apparently never incurred such Losses, and thus it was not entitled to a specific payment of
 12 \$8 million.

13 **3. Autonomy’s reliance on the *Barton* case is misplaced.**

14 The authority Autonomy cites in support of its motion to dismiss GA Escrow’s breach of
 15 contract claim is easily distinguished. Motion at 8-9 (citing *Barton v. Elexys Int’l, Inc.*, 62 Cal.
 16 App.4th 1182 (1998)). *Barton* is inapposite because the contractual right at issue in that case was
 17 the right to exercise an option, not the right to object to a fraudulent payment request. A
 18 contractual time limit on the right to exercise an option is fundamentally different than a time
 19 limit on a right to object to a claim for indemnification when concealment, fraud or
 20 misrepresentation is later discovered. *See Weatherly*, 125 Cal. App. 4th 913 (reversing summary

21 ⁸ The statutory limitations period for a breach of contract action is four years. Cal. Code Civ.
 22 Proc. § 337. Section 8.6 of the Merger Agreement would be unenforceable under California law
 23 if it were interpreted to be an agreement to shorten the applicable limitations period. Although
 24 parties may contract to shorten the statute of limitations, the contractual limitation cannot be “in
 25 itself unreasonable.” *Charnay v. Cobert*, 145 Cal.App.4th 170, 183 (2006) (finding 10-day period
 26 to object to an invoice inherently unreasonable). In the cases where California courts have upheld
 27 contractual limitations, such “reasonable” limitations range from three months to one year. *See,*
e.g. Capehart v. Heady, 206 Cal.App.2d 386 (1962) (finding landlord’s notice to quit triggered
 28 the three-month contractual limitation on tenant’s right to sue); *Fageol Truck & Coach Co. v.
 Pac. Indem. Co.*, 18 Cal.2d 748 (1941) (upholding one-year contractual limitation on reporting
 the loss of a truck). Even if the 10-day objection period were construed as an implied shortening
 of time for breach of contract actions, it is manifestly unreasonable to require GA Escrow to
 assert a breach of contract within 10 days of receipt of the Notice of Claim.

1 judgment award and holding that contractual limitations period should have been tolled under
 2 delayed discovery doctrine).

3 In *Barton*, plaintiff, a former employee, brought a breach of contract case against his
 4 former employer regarding expired stock options. Plaintiff sought to exercise options a year after
 5 the exercise date provided for in his stock option agreements. At the time of his termination, the
 6 market price of the company's stock was less than or equal to the exercise price of the options he
 7 held, and he quite understandably chose not to exercise them. There was no fact concealed from
 8 him. Over a year after the exercise date, when he knew the stock was trading at a price 15 times
 9 higher than his lowest priced expired options, the former employee brought his action against the
 10 company. Plaintiff's attempt to seek a remedy for his investor's remorse a year later cannot be
 11 equated to GA Escrow's effort, immediately upon learning that a fraud had been committed, to
 12 stop Autonomy from wrongfully converting monies owed to the Escrow Participants.⁹

13 **4. Autonomy's covenant/condition argument is invalid.**

14 Autonomy also presents a specious argument that the breach of contract here was merely
 15 the breach of "a condition rather than an express covenant." Motion at 9 (citing *Britschgi v.*
 16 *McCall*, 41 Cal.2d 138, 144 (1953)). The point of the argument is summed up in Autonomy's
 17 statement that: "Nowhere in either the Escrow Agreement or the Merger Agreement did
 18 Autonomy promise to provide a 'proper' payment request." Motion at 9. In essence, Autonomy
 19 is arguing that it could lie outright by filing a payment request that was false in every respect,
 20 including whether Autonomy had suffered any loss.¹⁰ One cannot read the Escrow Agreement
 21 and Merger Agreement as a whole and reasonably believe that the parties agreed that Autonomy
 22 could make claims for amounts it was not entitled to obtain under the Agreements. By attempting

23 ⁹ Like many of the cases cited by Defendant, *Barton* is also distinguishable from this case in that
 24 it addresses a motion for summary judgment, not a Rule 12(b)(6) motion to dismiss. The *Barton*
 25 Court ruled that, after the parties conducted discovery, plaintiff failed to create "a triable issue of
 26 fact as to whether the executive salary continuation plan included stock options" and affirmed
 summary judgment in favor of defendant. *Id.* at 1184. Here, GA Escrow has not had an
 opportunity to conduct any discovery.

27 ¹⁰ The term "Loss" is defined in Section 8.2(a) of the Merger Agreement and does not include a
 28 claim where Autonomy has suffered no detriment.

1 to parse out Autonomy's rights and obligations into conditions versus covenants, Autonomy
 2 seeks to justify its act of requesting money to which it clearly was not entitled.

3 In the context of this supposed distinction between a "condition" and a "covenant"
 4 Autonomy further advances its argument that GA Escrow should have presented an objection to
 5 the Payment Request, "even a frivolous one," which would have "automatically prevent[ed]
 6 disbursement of the requested amount." Motion at 9. The very fact that the only remedy to stop
 7 Autonomy from improperly taking money is a "frivolous" objection to an escrow request
 8 indicates how far fetched Autonomy's argument is about the supposed distinction between and
 9 enforceability of a "condition" and a "covenant."

10 The only decision that Autonomy cites for the proposition that "a cause of action for a
 11 breach of contract does not lie where the matter was merely a condition rather than an express
 12 covenant" is completely inapplicable to this case. Motion at 9 (citing *Britschgi v. McCall*, 41
 13 Cal.2d 138 (1953)). In *Britschgi*, defendants agreed to sell land "contingent upon the seller being
 14 able to eliminate the interest" of a third party who held a lease with an option to purchase most of
 15 the property. The court held that the provision concerning elimination of the third party interest
 16 was a condition precedent to the defendants' duty to convey, and therefore there was no fault in
 17 their failure to fulfill it. *Britschgi*, 41 Cal.2d at 143. Thus, the *Britschgi* court found that the
 18 purchase contract upon which plaintiffs sought to sue did not exist because the condition
 19 precedent had not been satisfied. Autonomy cannot plausibly argue that no contract exists here in
 20 light of the fact that the indemnification process set out in Section 8.6 represents the final stages
 21 of a \$400 million acquisition, the terms of which were governed by the Merger Agreement.

22 **5. GA Escrow has properly alleged damages.**

23 Autonomy's Motion mistakenly argues that GA Escrow bears the burden of proving
 24 causation at this stage of litigation. In fact, all that GA Escrow is required to do and has done is
 25 allege a set of facts that connect the breach and resulting damages. Autonomy's cited authority,
 26 *State Farm Mut. Auto. Ins. v. Allstate Ins.*, 9 Cal.App.3d 508, 528 (1970), directly contradicts its
 27 own argument. In *State Farm*, the court heard an insurer's appeal from a declaratory judgment
 28 for the insureds, not an appeal from a motion to dismiss. Before embarking on a detailed

1 discussion of the facts presented at trial, the *State Farm* court observed that, “[c]ausal
2 determinations are a function of the fact trier.” *Id.* at 529.

3 As Autonomy acknowledges in its Motion, dismissal for failure to state a claim under
4 Rule 12(b)(6) is appropriate only “when it appears beyond doubt that the non-moving party can
5 prove no set of facts in support of its claim.” Motion at 6 (citing *Manshardt v. Fed. Judicial*
6 *Qualifications Comm.*, 401 F.3d 1014, 1016 (9th Cir. 2005)). Put differently, the proper inquiry
7 is whether it is possible that the non-moving party can prove a set of facts in support of its claim.
8 Here, GA Escrow has pleaded that Autonomy breached the Agreements by submitting a false
9 Payment Request for approximately \$8 million in losses. Complaint ¶ 30-32. As a direct result
10 of that breach, Autonomy received \$8 million of the Escrow funds that should have been paid to
11 GA Escrow on behalf of the Escrow Participants. Thus, GA Escrow has alleged facts which
12 would, if proven, entitle it to its requested relief.

13

14 **D. GA Escrow Has Successfully Stated A Cause Of Action For Unjust
Enrichment And Is Entitled To An Accounting.**

15 Contrary to Autonomy’s conclusory arguments, Section 8.6 of the Merger Agreement
16 does not bar GA Escrow’s cause of action for unjust enrichment or an accounting. Autonomy’s
17 arguments are based entirely on the assertion that Section 8.6 precludes any allegations that
18 Autonomy was not entitled to the funds paid pursuant to the Payment Request. Motion at 13. For
19 the reasons set forth above, Section 8.6 does not preclude GA Escrow from alleging that because
20 of Autonomy’s fraudulent behavior—submitting a Payment Request with no factual basis—
21 Autonomy is not entitled to the funds paid out pursuant to such a request.

22 To state a claim for unjust enrichment, GA Escrow must plead the “receipt of a benefit
23 and unjust retention of the benefit at the expense of another.” *Lectrodryer v. Seoulbank*, 77 Cal.
24 App. 4th 723, 726 (2000). GA Escrow has done so. It has alleged that Autonomy received a
25 benefit of \$8 million when it “received a distribution from the Indemnity Escrow Fund.”
Complaint ¶ 50. Further, GA Escrow has alleged that “any claims [Autonomy] has for Losses
26 under the Merger Agreement are less than \$8 million.” *Id.* ¶ 51. Finally, GA Escrow has alleged
27 that Autonomy has retained the entire \$8 million at GA Escrow’s expense. *Id.* ¶ 52.

1 Similarly GA Escrow properly seeks an accounting. An accounting may be sought
 2 “where . . . the accounts are so complicated that an . . . action demanding a fixed sum is
 3 impracticable.” *See Civic W. Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 14 (1977) (citing 3
 4 *Witkin, Cal. Procedure* (2d ed. 1971) *Pleading*, § 674, pp. 2300-2301.) As noted above,
 5 GA Escrow seeks only a fair determination of a sum certain that is subject to indemnification for
 6 Losses actually suffered by Autonomy. An accounting is the best mechanism by which to
 7 ascertain the correct portion of the \$8 million wrongfully obtained by Autonomy that is owed to
 8 the Escrow Participants.

9 **VI. CONCLUSION**

10 GA Escrow seeks only a fair determination of actual Losses that are subject to
 11 indemnification. It sought to resolve this dispute without litigation, but Autonomy’s failure to
 12 provide any factual basis for its “approximate” claim for Losses made it clear that Autonomy
 13 never had any basis for its claim. Accordingly, GA Escrow has properly plead causes of action
 14 for fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair
 15 dealing, breach of contract, unjust enrichment and an accounting, and Autonomy has failed to
 16 show otherwise. Therefore, GA Escrow respectfully requests that the Court deny Autonomy’s
 17 Motion to Dismiss in its entirety. If the Court should sustain any part of Defendant’s motion,
 18 GA Escrow respectfully requests that it be granted leave to amend its Complaint.

19 DATED: June 20, 2008

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